STATE OF MICHIGAN

COURT OF APPEALS

JSB ENTERPRISES, INC.,

Plaintiff-Appellee,

v

AWRY ENTERPRISES, INC., INNOVATIVE PROGRAMS GROUP, INC., DIXIE A. LEHRMITT, and DEANE LEHRMITT,

Defendants,

and

PRO-MARK PROFESSIONAL MARKETING & INSURANCE SERVICES, INC.,

Defendant-Appellant.

UNPUBLISHED
April 22, 2010

No. 288981
Oakland Circuit Court
LC No. 2007-084174-CK

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Pro-Mark Professional Marketing & Insurance Services, Inc. (defendant), appeals as of right the judgment entered in favor of plaintiff. We affirm.

Defendant first argues that the circuit court abused its discretion in denying the motion to set aside the default because, among other reasons, only defendant, Deane Lehrmitt (Deane) was served with process. We disagree.

To preserve an issue for appeal, a party must have raised the issue below and received a ruling on it. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Defendant did not preserve this argument regarding insufficiency of service of process because it did not make this argument below until it filed a motion for reconsideration. Where a party first presents an issue in a motion for reconsideration, the issue is not properly preserved. See *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 328-329; 651 NW2d 811 (2002). This Court may elect to address unpreserved issues where they present questions of law and the facts necessary for their resolution are presented. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). When we choose to do so, in civil cases we review

unpreserved issues for plain error affecting substantial rights. *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004).

Defendant first argues that the circuit court erred in denying its motion to set aside the default because the default was improperly entered against all defendants where only Deane was served with process. "[A]lthough the law favors the determination of claims [and defenses] on the merits, it has also been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999) (citations omitted). In response, plaintiff argues that defendant waived this issue below. We agree with plaintiff.

Certain defenses must be raised right away, or they are waived. MCR 2.116(D) provides:

> (D) Time to Raise Defenses and Objections. The grounds listed in subrule (C) must be raised as follows:
>
> (1) The grounds listed in subrule (C)(1), (2), and (3) must be raised in the party's first motion under this rule or in the party's responsive pleading, whichever is filed first, or they are waived.

Subrule (C) lists the defense of insufficient service of process. MCR 2.116(C)(2). Thus, defendant's first pleading, or first motion under MCR 2.116, had to assert insufficiency of service of process, otherwise that defense was waived. Defendant's answer failed to assert this defense. Therefore, defendant waived it. See MCR 2.116(D).

Defendant also argues that plaintiff's motion for a default judgment violated MCR 2.601(B). This argument is abandoned because it is not stated in the statement of questions presented. See MCR 7.212(C)(5); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

Defendant also argues that the circuit court abused its discretion in refusing to set aside the default because a lesser showing of good cause was permitted since the defense it eventually asserted would be absolute. We disagree.

Generally (when personal jurisdiction is not at issue), a motion to set aside a default is granted only if the defaulted party shows good cause and files an affidavit of facts showing a meritorious defense. MCR 2.603(D)(1). Here, defendant filed an affidavit of facts showing at least one meritorious defense. The issue is whether defendant showed good cause.

A defaulted party can show good cause by showing either a procedural defect or irregularity, or a reasonable excuse for the inaction that caused the default. *Alken-Ziegler, Inc*, 461 Mich at 233. Whether there was an abuse of discretion, by failing to set aside a default, also depends on whether affirming would cause manifest injustice. *Id*. Where a defaulted party's affidavit shows a strong meritorious defense, a lesser showing of good cause is permitted, in order to prevent manifest injustice. *Id*.

Defendant's first defense, an agreement to arbitrate, was meritorious. However, it would not be absolute. The complaint sought, inter alia, to implead funds "until the conclusion of

litigation and/or arbitration." Thus, this action did not preclude arbitration, but sought to insure that funds would be available to satisfy any arbitration award for plaintiff. Thus, the arbitration defense was not absolute.

Defendant's other defenses (that it was not a party to the contract, and that it did not breach the contract) would not, if proven, be absolute. This is because a lack of a breach would not preclude the remedies sought in the complaint (pre-judgment "impleading" of funds to satisfy any potential judgment in plaintiff's favor). Thus, a lesser showing of good cause was not warranted.

Defendant did not establish good cause. First, there was no procedural defect or irregularity. Defendant's argument regarding insufficiency of service of process was waived.

Second, defendant's attorneys, once defendant secured counsel,[1] appeared as counsel for *all* defendants. The default was served on all defendants. The motion for default judgment, and re-notice of hearing on that motion, were served on all defendants. Yet, defendant failed, for a substantial time, to defend, and defendant fails to state a substantial reason why, for a substantial time, it failed to defend.

Defendant also argues that the circuit court abused its discretion in denying the motion to set aside the default because the default and default judgment were entered in violation of MCR 2.601(B), which prohibits a default judgment from granting relief different from the relief demanded in the pleading, unless notice was given under MCR 2.603(B). We disagree.

First, if the default judgment was improperly entered, this does not show an abuse of discretion in the denial of the motion to set aside the default. A default and default judgment are two different things, entered at two different times. MCR 2.603. Second, notice under MCR 2.603(B)(1) *was* given by plaintiff, to defendants, of the motion for entry of default judgment. For all of these reasons, we find no plain error, and no abuse of discretion, in the denial of the motion to set aside the default.

Next, defendant argues that the trial court clearly erred in assessing damages against it because it was not a signatory to the service agreement at issue. Defendant failed to preserve this issue below by asserting it before the entry of the judgment. We decline to consider it. See *Coates v Bastian Bros, Inc*, 276 Mich App 498, 509-510; 741 NW2d 539 (2007).

Affirmed. Costs to plaintiff as the prevailing party. See MCR 7.219(A).

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

[1] Apparently, defendants did not secure counsel for quite a while because there were settlement negotiations that, according to Deane, had resulted, for a time, in the reinstatement of the program.